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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1163

UNITED MINE WORKERS OF AMERICA,

Petitioner,

v.

TENNESSEE CONSOLIDATED COAL COMPANY and GRUNDY MINING COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO OPPOSITION BRIEF

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FOREWORD

TCC and Grundy[1] do not challenge UMW's contention that the Sixth Circuit yielded to their contention that UMW should have abandoned its historic policy of uniformity of labor standards, acceded to plaintiffs' demand they be subsidized at coal miners' expense and afforded a wage advantage over competitors derivative from regional collective bargaining. Instead, they press upon

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[1]The parties and pagination references will be referred to herein as they were in the certiorari petition. In addition, the Opposition Brief is referred to as "Br."

this Court *two fallacious positions* which *conflict* with this Court's prior important decisions relating to labor's exemption from the antitrust laws:

1. Though conceding under *first Pennington*[2] that UMW could lawfully "make wage agreements with a multi-employer bargaining unit and . . . in pursuance of its own union interests seek to obtain the same terms from other employers" (381 U. S. 665), TCC and Grundy complaints (Br. 21) of UMW failure "to modify the national contract terms so that wages could be paid on some form of incentive basis, or determined on the basis of productivity, so that wages would be lower than UMW scale for low productivity, but higher if productivity were high enough", that "the older system of differentials was fair" and that "across-the-board wage increases constantly applied is so unfair" (Br. 14), make it evident they seek this Court's adoption of a policy that *business competition be based upon wage competition*—a theory rejected by this Court's *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, and consistently followed since 1940. Indeed, adoption of such a policy "*is not national policy*",[3] according to *first Pennington's* concurring opinion of Justices Goldberg-Harlan-Stewart (381 U.S. 711).[4] Nor do respondents[5] challenge UMW's citation of the district court's *Ramsey* (265 F.Supp. 431), affirmed by the Sixth Circuit (416 F.2d 655), which condemned their thesis (Pet. 30-31). Indeed, the Sixth Circuit's *Bale* v. *Glasgow Tobacco Board of Trade, Inc.*, 339 F.2d 281, 287, held "*It is not the purpose of the Sherman Act to guarantee an investor a profit . .*"

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[2]*Pennington* v. *UMW*, 381 U. S. 657 (1965).

[3]Unless otherwise indicated, all emphases are supplied.

[4]This concurrence is found at the conclusion of the majority opinion in *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676, at pp. 697, *et seq.*

[5]References to respondents are to TCC and Grundy.

2. That respondents urge upon this Court that *effects and consequences* may be substituted for proof of an anti-competitive conspiracy, despite this Court's rejection of such a thesis (Pet. 41-45), is evident from their complaints concerning effects and consequences found at pp. 13-14, 15-20 and 21-27 of their Opposition Brief. The Sixth Circuit's affirmance of *Ramsey* carried with it the district court's rejection of effects and consequences in its assertion that "No clear antitrust significance can be drawn from" statistics showing that two large coal producers had profitable operations while the rest of the industry suffered a loss (265 F.Supp. 409-10).

Crucial omissions and inaccuracies in statements and arguments prompt petitioner's instant reply, in which petitioner will follow the sequence used in the Opposition Brief.

UMW'S REPLY TO RESPONDENTS' COUNTERSTATEMENT OF QUESTIONS PRESENTED

Questions presented by UMW (Pet. 3-4) appropriately set forth the questions involved herein.

UMW'S REPLY TO RESPONDENTS' COUNTERSTATEMENT OF THE CASE

A. The material covered (Br. 3-4) concerns TCC and Grundy's conspiracy charges. It inadequately relates UMW's theories contained in its certiorari petition (p. 5).

B. The jury's answer to Special Issue (2) was not restricted to exonerating UMW of conspiracy charges *"before PWC"*, as respondents urge (Br. 7), but the jury's *actual* finding was that *"prior to and apart from"* the 1958 Agreement, UMW did not conspire with signatory operators to contract with non-signatory operators

only upon the National Agreement's terms (Pet. 6). This alleged *restriction* of the jury findings occasioned UMW's complaint in both lower courts that the jury findings had been misinterpreted, discussed in the certiorari petition, pp. 9-12, 16-17.

C. Though TCC and Grundy accurately recite (Br. 8) the Sixth Circuit's agreement with the district court there was substantial evidence to support the jury finding, they ignore the district court's expressed doubts concerning the jury verdict, UMW's challenge to the Sixth Circuit's characterization of the evidence as conflicting and its test standard, and UMW's contention that substantial evidence under *first Pennington, Gibbs* and the Sixth Circuit's *second Pennington* and *Ramsey*[*] means *clear, unequivocal and convincing proof.* TCC and Grundy ignore also UMW's charge (Pet. 7-8) that denials of a conspiracy by UMW officials and other witnesses were *undisputed* and that *Ramsey* (265 F.Supp. 388) exonerated UMW of the alleged conspiracy.

D. The Sixth Circuit decided the instant case on *September 19, 1969.* Its affirmance of the district court's *Ramsey* (265 F.Supp. 388), by an equally divided court, came *September 26, 1969* (416 F.2d 655).

TCC and Grundy accurately state (Br. 9) the Sixth Circuit *originally* in a 2 to 1 decision (Circuit Judge Edwards dissenting) reversed the district court on the ground that a *preponderance of evidence* was sufficient to support the conspiracy charge. However, Judge Edwards' dissent appropriately noted the majority opinion overruled the Sixth Circuit's *second Pennington,* ignored *first Pennington's* standard of proof and opened

[*] *Pennington* v. *UMW,* 381 U. S. 665; *UMW* v. *Gibbs,* 383 U. S. 715, 736, (1966); *Lewis* v. *Pennington,* 400 F.2d 806, 814; *Ramsey* v. *UMW,* 416 F.2d 665, 661-62.

the door to practical elimination of the exemption accorded labor unions under Section 6 of the Clayton Act (15 USCA 17).

Ramsey's district court opinion did not state upon what facts it premised its conclusion UMW impliedly committed itself to BCOA to bargain only upon the National Agreement's terms, nor did it hold this would constitute a *Sherman* violation. The original majority opinion ignored *Ramsey's* further and contrary district court finding that *"The only direct evidence in the record is to the effect that the Union pursued such policy upon its own, and not in agreement with any employer"* (265 F.Supp. 412) and *"All of the direct evidence in the record expressly denies the plaintiff's contentions of a conspiracy"* and *"Every officer of the Union who testified, as well as every representative from the coal industry alleged to be in on the conspiracy, denied its existence"* (p. 432).

Hence, upon UMW's petition for rehearing en banc, which was granted, the Sixth Circuit, by an equally divided court, affirmed the district court's *Ramsey* (416 F.2d 655).[7] The issue over which the court divided was whether *Norris-LaGuardia's* Section 6 requires all elements of a cause of action for antitrust violation to be proved by "clear proof" where a labor union is a defendant, as held in the Edwards dissent, or whether the statute's "clear proof" standard is limited "to the determination of the authority of 'individual officers, members, or agents' to act for a labor union or other organization", as the O'Sullivan opinion contended (416 F.2d 667).

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[7]Circuit Judge Edwards' affirming opinion was concurred in by Chief Judge Phillips and Circuit Judges Peck and Combs. The opinion of Circuit Judge O'Sullivan for reversal was joined in by Circuit Judges Weick, Celebrezze and McCree.

The O'Sullivan opinion read the "black letter title", reading, "Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents" as clearly exposing the Section's limitations (416 F.2d 667). However, the O'Sullivan opinion overlooked two crucial factors: First, the Sixth Circuit's *second Pennington* (400 F.2d 814) had already held that an anticompetitive conspiracy must be established by "clear proof", citing *Gibbs* (383 U.S. 715), and second, following the Sixth Circuit's adoption of its "clear proof" rule, this Court denied certiorari in *second Pennington* (393 U.S. 983), one question submitted being the applicability of the "clear proof" rule.[6]

Since a question posed in the instant case is whether the Sixth Circuit erred in holding that *Norris-LaGuardia's* Section 6 does not require the unlawful act of conspiracy, upon which this action is based, to be shown by "clear proof", further discussion is found herein, *post*, p. 16.

UMW'S REPLY TO THE COUNTERSTATEMENT OF FACTS

UMW's certiorari petition (pp. 21-31) covers either the facts of the instant action, or *Ramsey's* and the jury's findings of the various factors pertaining to the charged conspiracy. Since, concededly, *Ramsey's* facts and those herein are substantially identical (Pet. 7), it is noteworthy that *Ramsey's* affirming opinion recites, "The District Judge's analysis of the evidence . . . is masterly",

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[6]In *second Pennington's* certiorari petition (Case No. 558, October Term, 1968), Question 4 read thus:

> "Is a Sherman Act case, based on a national contracting combination of union and business groups, to fail because of the proof of specific intent being held insufficient to satisfy Norris-LaGuardia's 'clear proof' rule when there can be no question of authorization, ratification and participation in the industry-wide bargaining?"

covering "52 pages of Volume 265 of Federal Supplement" (416 F.2d 663).

A. Respondents' charge (Br. 10-16) that UMW abandoned its basic policies after 1950 when BCOA was established, and cooperated in fulfilling purposes of major companies in not allowing production that did not pay the terms of UMW's contract, notably *does not challenge, but ignores* undisputed, positive denials that UMW entered into any agreement other than the collective bargaining agreement, and UMW's historic policy for national uniformity of labor standards (Pet. 21-23). Respondents' charges (Br. 11-13) concerning stabilizing the coal industry, BCOA's formation, and the development of a new bargaining technique, mechanization and the "repeated flat increases", are all matters of which the jury exonerated UMW of the alleged conspiracy (Pet. 9). Respondents' emphasis on the wage increases in the post-1950 period invites *Ramsey's* finding that such increases "have not been out of line with wage increases in the other basic industries" and "In fact, there were fewer increases in the coal industry from 1950 through 1958 than in the steel, automotive, copper, rubber and oil industries" (265 F.Supp. 408). Moreover, *Ramsey* rejected respondents' contention that "wage scales negotiated in the national contract and its amendments were tailored to further an unlawful conspiracy to suppress or eliminate competition . . ." (p. 408).

TCC and Grundy fail to tell this Court that, *undisputably,* UMW had nothing to do with BCOA's formation, its membership was open to all operators, large or small, and when formed it represented 262 individual coal companies, *of which number one-half mined less than 100,000 tons a year* (1505a).

Respondents' charge (Br. 11-12) that in the post-1950 period UMW changed its basic policy of representing all and not just a part of its members, with the accompanying policy of seeking equality of working opportunity for all members, finds a ready response in the concurring opinion of Justices Goldberg-Harlan-Stewart in *first Pennington,* which records UMW's openly-stated preference, "if need be, for a reduced working force in the industry, with those employed working at high wages, rather than for greater total employment at lesser wage rates", recognizing that existence of marginal operators "does not serve the best interests of the working miner but, on the contrary, depresses wage standards and perpetuates undesirable conditions" (381 U.S. 698).

Respondents' claim (Br. 11) of policy change by major companies, by pointing to a statement that Consolidation Coal Company had a purpose in seeing that no competitor paid lower costs than that company, does not bespeak a conspiracy to run operators out of the industry, but only a desire to remain in the industry. "The anti-trust laws do not require a business to cut its own throat" (*Brown* v. *Western Mass. Theaters, Inc.,* 1 Cir., 288 F. 2d 302, 305).

The effects and consequences to mining communities, unemployment, losses in the coal industry and profits of "two largest companies" therein (Br. 14-16), stressed by respondents, and their inefficacy as proof of an anti-competitive conspiracy where a labor union is charged, has been demonstrated (Pet. 43-44; *ante,* p. 3).

B. Respondents' long quotation from *Ramsey* (Br. 17-18), dealing with competition in the southeastern Tennessee coal field on the TVA market, geological condi-

tions and the inability of coal producers therein to compete and survive in that market, must be compared with *Ramsey's* holdings that "*Neither the nature of the competition, the coal seam characteristics, the comparative adaptability to mechanization, nor other factors enhancing the problems of marginal coal producers can compel wage differentials or form a basis for a court altering the legislatively permissible . . . policy of . . . wage uniformity*" (265 F.Supp. 408) and "*the economic pressures created by technological advances and the competition engendered thereby do not equate*" a *Sherman* violation (p. 409). Indeed, *Ramsey* professes *Sherman* "is designed to keep the market open so that competitive pressures may operate" (p. 409). Nor may the long quotation be isolated from *Ramsey's exoneration of UMW, in both lower courts, from the charged conspiracy.*

Ramsey's quoted holdings respond fully to respondents' complaint (Br. 18) that UMW's contract was impossible in southern Tennessee.

In complaining of strike activity (Br. 18-20), respondents ignore UMW's citation (Pet. 37) of *Hunt v. Crumboch*, 325 U.S. 821, 824 and *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 503, declaring *Sherman* does not condemn strike activity.[9]

C. Respondents' discussion of UMW's interest as investor in West Kentucky Coal Company (Br. 20-21) ignores *first Pennington's* concurring opinion of Justices Goldberg-Harlan-Stewart that even ownership of a controlling or substantial interest in a company is

[9]It is appropriate to note that while *Ramsey* involved violence, in the instant action the district court specifically observed that *no violence was involved herein* (Pet. A. 45a).

not a *Sherman* violation, absent evidence that the owner "participated knowingly and actively in the alleged illegal activity" (381 U.S. 734). UMW's certiorari petition's discussion (pp. 25-26) of West Kentucky investments shows, *inter alia*, that *numerous witnesses testified UMW played no part in West Kentucky's management or pricing policies; and there is no contradiction thereof. Even respondents' counsel conceded UMW did not control West Kentucky's marketing policies* (1650a).

UMW's response to respondents' charge that West Kentucky tripled its share of TVA business in the 1958-64 period (Br. 20) is found in *Ramsey's* findings that its pricing to TVA "was a matter of business judgment, and not predatory pricing, to depress the T.V.A. coal market" and that West Kentucky offered coal to other utilities at the same price (265 F.Supp. 421), which is consonant with the district court's *second Pennington* (257 F.Supp. 815, 863). Both *Ramsey* and *second Pennington* had Sixth Circuit affirmance (416 F.2d 655; 400 F.2d 806).

D. TCC points (Br. 21) to failure to raise productivity in 1959, notwithstanding "heavy expenditures" for machinery,[10] as the basis for cancellation of its UMW contract in 1960. While it is factual TCC failed to increase productivity, TVA cancelled its long-term contract by reason thereof, and thereafter TCC cancelled its UMW contract, the district court found "no reasonable relationship" between this failure "and any Sherman Act violation" by UMW (A. 69-70a).

TCC refers (Br. 22) to a 1960 Section 22 rail rate from the western Kentucky coal field to TVA's Widows

[10]TCC's efforts to achieve higher productivity in this period were viewed by TVA as "indefinite" and "inadequate" (249-50a).

Creek steam plant (the plant to which TCC sold coal) and a "price ceiling" resulting at that market. These matters need to be brought into focus. In 1960, the Interstate Commerce Commission approved a lower rail rate to Widows Creek—the so-called Section 22 rate—*on application of TVA and L & N Railroad,* and over TCC's strident opposition. *Neither UMW nor West Kentucky Coal Company played any part in the Section 22 rate* (272-83a, 1342-45a, 1440-41a, 1464a). *Ramsey* held (265 F.Supp. 422), "since it involves an appeal to a governmental agency, it could not involve a *Sherman*" violation, citing *first Pennington.*

As already noted (*ante,* p. 10), the evidence is positive UMW played no part in West Kentucky's pricing policies, a fact acknowledged by respondents' counsel. Furthermore, as noted (*ante,* p. 10), district courts in both *second Pennington* and *Ramsey* found the bids motivated by legitimate business considerations.

TCC points (Br. 23) to its employment of engineers Allen and Garcia in 1961, which UMW discussed in its certiorari petition (p. 28). While TCC points (Br. 26) to what it terms an "unending strike", it fails to point out its contribution to the strike's duration which included, even after UMW certification, Grundy's refusal to discuss UMW's proposal to work out a temporary agreement by which the men would return to work pending negotiations (289a, 1111-14a, 711a, 1105a).

UMW's REPLY TO RESPONDENTS' ARGUMENT

I. THE INSTANT CASE PRESENTS AN IMPORTANT AND SUBSTANTIAL FEDERAL QUESTION.

Notably, respondents do not challenge UMW's contention that the Sixth Circuit's opinion herein heralds the destruction of industry-wide, multi-employer collec-

tive bargaining in its preference for regional bargaining, thwarts Congressional will and national labor policy, nullifies the Congressionally-granted exemption to labor unions and collides with this Court's *first Pennington, American Federation of Musicians* v. *Carroll*, 391 U.S. 99, and *Apex*, 310 U.S. 469 (Pet. 31, *et seq.*). Nor do respondents challenge any of UMW's reasons for Granting the Writ herein (Pet. 31-50).

Two court-tried cases (*Ramsey* and *second Pennington*) exonerated UMW of conspiracy charges while three jury-tried cases resulted in large money judgments against UMW.[11] These variant results emphasize the warning of Justices Goldberg-Harlan-Stewart against permitting juries to roam at large in the area of collective bargaining to become "arbiters of the economic desirability of the wage scale in the Nation's coal industry" (Pet. 32-33). If the enormous judgment herein is permitted to stand, the jury trial, employing the Sixth Circuit's techniques herein, will serve as a ready pattern in other pending cases (Pet. 48, fn. 28), as well as other litigation invited thereby, to make labor unions generally, and UMW specifically, easy prey in antitrust cases and for harassing, punishing and ultimately destroying UMW, which has existed for 80 years as the chosen bargaining agent for more than 80% of miners in the bituminous coal industry, for lawfully performing its right and duty as such, only because of local juror hostility to UMW's established and historic union policy of seeking to improve working and living standards for its members on a uniform and industry-wide

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[11]The instant case involves *$1,660,000.00*, as a result of a jury verdict against UMW and Consolidation Coal Company; UMW now faces a *$7,566,356.00* judgment in *South-East Coal Company v. UMW* (Pet. 48, fn. 28) [Consolidation Coal Company's appeal is now pending in the Sixth Circuit as Case No. 19,622]; and *first Pennington* which this Court reversed (381 U.S. 657).

basis. Indeed, the Sixth Circuit's *second Pennington* (400 F.2d 819) contains an admonishment against this precise hostility! The variance of result herein with that in *Ramsey* stresses the threat. Without the award of certiorari and judicial guidance, the jury verdict herein adverse to UMW leaves counsel for unions and management alike in a perplexing situation as to how labor agreements on an industry-wide, multi-employer basis may be achieved without subjecting their respective clients to long and exorbitantly expensive antitrust litigation.

In addition to the Reasons set forth in UMW's certiorari petition (Pet. 31-50), this Court has heretofore recognized that importance of preserving for litigants their right to a jury trial, particularly where a federal statute is involved, would warrant the award of certiorari to determine if the jury function of drawing inferences from proven facts has been respected. *Wilkerson v. McCarthy,* 336 U.S. 53, 55, 70-71.

A. The Substantial Evidence Issue.

UMW's certiorari petition (pp. 37-41) challenges the Sixth Circuit's approval of the jury verdict on the premise it was supported by "substantial evidence".

No challenge is made of UMW's contention that the Sixth Circuit's characterization of the evidence as *conflicting* was inaccurate (Pet. 8-9, 32). No challenge of the material submitted by UMW (Pet. 37-41) to support its challenge of the Sixth Circuit's approval of the jury verdict is found in respondents' brief. Neither do respondents respond thereto (Br. 27-28).

Respondents fail to point to any evidence which meets the clear, unequivocal and convincing standard of proof required to prove a labor union's liability under *Sher-*

man. Their emphasis on "effects and consequences" demonstrates their lack of that type of evidentiary support and that respondents' "claimed existence" of the conspiracy is to be "found in constant assertion" by them and their counsel *"rather than in the proof". G. & P. Amusement Co.* v. *Regent Theater Co.*, DC, N.D. Ohio, 1952, 107 F.Supp. 453, 461.

B. The Issue Concerning PWC.

UMW has answered (Pet. 34-37) respondents' contention that the lower courts properly held PWC's meaning was for the jury (Br. 28-30). Respondents do not challenge UMW's contention that such sanction conflicts with prior decisions of this Court and the Sixth Circuit's *second Pennington* and *Ramsey.* Their brief offers no response that Sixth Circuit citations are inapposite (Pet. 36).

Respondents are not impressive in or arguing (Br. 29), it is necessary to examine the entire contract, the circumstances surrounding its making and its practical construction by the parties who made it, since all three components emphasize its validity: (1) PWC's history (Pet. 23-24) demonstrates its validity. (2) Witnesses agree, *without contradiction* (Pet. 21-35), UMW agreed with no operator UMW was prevented from negotiating or executing a contract on terms different from the National Agreement or UMW would impose that Agreement's terms upon employers other than those bargaining at a particular time—testimony accredited by both *Ramsey* and *second Pennington.* Respondents' citation of 17 Am. Jur. 2d, Contracts, Section 274, pp. 683-85, does not support their contention that parties' statements of what they intended PWC to mean cannot be considered in interpreting the instant Agreement.

That Section recites: *"In the determination of the meaning of an indefinite or ambiguous contract, the construction placed upon the contract by the parties themselves is to be considered by the court . . . since the parties are in the best position to know what was intended by the language employed"* and *"It is to be assumed that parties to a contract know best what was meant by its terms and are the least likely to be mistaken as to its intention . . ."* Respondents' vice president and secretary and an attorney *concedes* Tennessee operators were told "All issues are negotiable" (Pet. 21). (3) Undisputed evidence pertaining to the JICC minutes (Pet. 24-25) does not establish a *Sherman* anticompetitive agreement.

Significantly, respondents fail to answer UMW's observation that PWC's current status is one of validity (Pet. 24) as a labor standards clause under Section 8(e), Labor Management Relations Act, 1947, as amended (see Appendix hereto, p. 23). They ignore this Court's rejection of the illegality *per se* doctrine of collective labor agreements. Since employers and unions are required to bargain concerning wages, hours and working conditions, conduct permitted by federal statutes "is not to be declared a violation of Federal law". *Allen Bradley Co.* v. *Local 3, Electrical Workers,* 325 U.S. 797, 806 (1944).

Absent any evidence of illegal *Sherman* conduct, it was error for the Sixth Circuit to sanction the district court's submission of the issue of PWC's meaning and validity to the jury, and to approve that verdict.

C. The Issue Of Effects And Consequences.

Answers to respondents' contentions (Br. 30) that the Sixth Circuit properly held the "effects and consequences" instruction did not constitute prejudicial error

are found in UMW's certiorari petition (pp. 41-45) and herein (*ante*, pp. 3, 8).

D. Issues Concerning "Clear Proof."

Respondents make no response to UMW's charge (Pet. 15) that the Sixth Circuit erred in holding that *Norris-La Guardia's* "Section 6 does not state that the unlawful acts must be shown by clear proof" (A. 17a). UMW assigned the Sixth Circuit's error as a basis for granting the Writ herein (Pet. 45-56).

The Sixth Circuit's error is manifest from language in *United Brotherhood of Carpenters* v. *U.S.*, 330 U.S. 395, that Secton 6's *"purpose and effect was to relieve organizations, whether of labor* or capital, and members of those organizations *from liability for damages or imputation of guilt* for lawless acts done in labor disputes by" individual officers or members thereof, *"except"* as Section 6 states, "upon clear proof" of the union's "actual participation in, or actual authorization of" unlawful acts "or of ratification of such acts after actual knowledge thereof" (330 U.S. 403). *Carpenters* recites *'Our only point is this: Congress in §6 has specified the standards by which the liability of employee . . . groups is to be determined"* (p. 410). Though *Carpenters* involved criminal proceedings, this does not detract from its primary holdings that Section 6 *is binding "upon all courts* of the United States *in all matters* growing out of labor disputes covered by the Act". *Gibbs* (373 U.S. 736) professes Section 6's general applicability in noting that Congress was selective in deleting its applicability from certain sections of the Labor Management Relations Act, 1947, and in rejecting any outright repeal thereof.

Contrary to respondents' claim the Sixth Circuit herein properly held district court's instructions on the ap-

plicable standards of proof did not constitute prejudicial error (Br. 32), actually the Sixth Circuit's opinion (A. 17-22a) fails to include the district court's *return to the "preponderance" rule*, telling the jury that on the charge of monopoly UMW "has monopolized, within the meaning of the antitrust laws, if it appears *from a preponderance of the evidence* . . . that first they knowingly combined or conspired either to obtain or to maintain the power either to remove or exclude, or to keep out competitors . . ." and "Monopolization may be found to exist whenever it appears from a preponderance of the evidence" (1725a).[12]

While the district court undertook to clarify and correct its "clear proof" charge as the Sixth Circuit noted (A. 20-21a), it failed to answer UMW's contention that the district court's phrase, *"as I have charged you originally"*, is an obvious reference to the *preponderance rule* given in the initial discussion on standard of proof. The Sixth Circuit's sanction of the charge on standard of proof fails to meet its own requirement in *Sessoms* v. *Union Savings & Trust Co.*, 6 Cir., 338 F.2d 752, 759 (1964) that *"where there is an erroneous instruction, it should be corrected by a positive statement of the court that the instruction in question was erroneous and is specifically corrected by the later instruction"*. In the instant case, the last reference to the preponderance rule appeared at p. 1725a; and the Sixth Circuit's opinion demonstrated (A. 20-21a) that the attempted corrective charge appeared at pp. 1760-61a—a separation of at least 35 pages. A separation of "some forty pages" caused the Fifth Circuit's *Paramount Film Distributing Corp.* v.

[12]It is noteworthy that the Sixth Circuit's opinion on standard of proof contains excerpts from the jury charge found at pp. 1720-23a and then skips to pp. 1760-61a, omitting the foregoing material on p. 1725a.

Applebaum, 217 F.2d 101, 125 to condemn an attempted correction of a jury charge.

The charge as a whole on standard of proof will leave this Court, as it must have left the jury, in *total uncertainty* as to what principles the district court was attempting to explain, but in a state of certainty that what it charged varied with the Sixth Circuit's *second Pennington's* requirement of "clear proof" of *predatory intent.*

E. The Issue Of Specific Intent.

UMW's certiorari petition (pp. 16, 46-47) complained the district court erred in charging it was *not necessary* for UMW to have a "specific intent to establish a monopoly or *destroy competition*". The Sixth Circuit regarded this error as *one not meriting discussion* (A. 22a). Despite UMW's demonstrating the Sixth Circuit's sanction collides with *second Pennington's* (400 F.2d 814) requirement that *predatory intent is essential*, respondents fail to respond thereto.

F. The Issue Of Misinterpretation Of The Jury Verdict.

Answers to respondents' contention (Br. 33-34) that UMW is clearly wrong concerning the district court's misinterpretation of the jury's General Verdict and the Sixth Circuit's answer thereto are found in its certiorari petition (pp. 6, 16-17).

UMW has already pointed out that the jury's Special Issue (2) finding exonerated UMW of the charged conspiracy "*prior to and apart from*" the 1958 Agreement (*ante*, pp 3-4). PWC's relevancy to the General Verdict becomes clear in colloquy preceding the district court's submission of Special Issues to the jury. In overruling UMW's objections (1767a), the district court posed the

inquiry, "suppose that the Court has made some error in respect to" PWC, "how are we going to know how the jury decides the case?" (Second S.A. 1-8)[13] and avowed that "special interrogatories" should be submitted *"so that you will know, if possible, on what any verdict is based"* (Second S.A. 7).

The jury's exoneration of UMW of conspiratorial conduct *"prior to and apart from"* the 1958 Agreement directly conflicts with the district court's opinion and the Sixth Circuit's sanction that the General Verdict reflected "all of the evidence and not merely" that which related to PWC (A. 57a). Both render meaningless UMW's jury exoneration that *"prior to and apart from"* PWC it had not conspired in violation of *Sherman*. Further, the jury's Special Issue Finding (1) that UMW exceeded its labor exemption integrates all three Special Issue Findings and reflects the jury's General Verdict on liability that UMW engaged in a conspiracy "outside or beyond the exemption granted by the antitrust statutes to a labor organization" (Pet. 6). Had the two lower courts upheld UMW's contention, it would have obviated the necessity of considering any evidence other than that which dealt with PWC. UMW's demonstration of error with reference to PWC (*ante*, pp. 14-15) affords full showing that entry of judgment for UMW pursuant to its directed verdict motions and for judgment n.o.v. would have been appropriate.

Pertinently, respondents do not challenge UMW's contention (Pet. 17) the Sixth Circuit misconceived Rule 49(b), Federal Rules of Civil Procedure and erred in its other holdings pertaining to its contention that error

[13]This reference is to the "Second Supplement to Joint Appendix filed By Defendant-Appellant, United Mine Workers of America", filed in this Court as a part of the certified record.

existed in the district court's misinterpretation of the jury's General Verdict and the Sixth Circuit's approval thereof.

G. The Issue Of Damages.

Respondents deny (Br. 35) the 1962 strike resulted from Grundy's refusal to bargain with UMW and refer to an October, 1962 meeting in which Grundy's officers discussed an agreement with UMW. The meeting's purpose, however, was not negotiation of the new agreement, but to determine whether Grundy would honor the balance of the Allen and Garcia-UMW agreement. This Grundy agreed to do. There was discussion of a successor contract, but on these terms: the company attorney threatened, "if UMW didn't do something different the company would file a suit". Two days later the company filed a suit against UMW for 6 million dollars (1092a). The fact is that from the day Grundy took over until this day, with the exception of the October meeting, Grundy has refused to meet or negotiate with UMW. Initially, Grundy insisted it would not meet until NLRB certification, but after certification it continued to decline to meet, even though UMW indicated a willingness to work out a temporary agreement whereby the employees would return to work (1111-14a, 289-90a, 711-13a, 1105a).

It was under these circumstances that union employees of Grundy entered upon a strike in December, 1962, and it was the losses sustained by respondents by reason of their refusal to work that accounts for the principal element of damages recovered by TCC in this action. The measure of damages was what TCC said it would have earned in the strike period as shown by what TCC earned after it was able to add new employees—

replacing the strikers—to their payroll, train them and work them at a wage *which it alone determined* and which was substantially below the scale the striking employees were willing to accept. Nothing in this Court's *first Pennington* remotely suggests approval of such a measure of damages. Its approval by the courts below manifestly warrants this Court's rejection.

H. The Jury Panel Issue.

Facts pertaining to UMW's motion to strike the jury panel and the Sixth Circuit's sanction of the district court's refusal to do so appear in the certiorari petition (pp. 18-20, 49-50). To challenge UMW's argument that the lower courts erred in refusing to sustain UMW's position, respondents point to the jury's composition deciding the case (Br. 38), which UMW submits evidences a basic misconception of principles relating to the issue: *"The focus of the law is on the list from which the jury is drawn and not on the composition of a particular jury . . ."* *Rabinowitz* v. *U.S.*, 5 Cir., 366 F.2d 34, 59 (1966).

CONCLUSION

For the reasons assigned in its Petition for Certiorari and herein, UMW prays that the Petition for Writ of Certiorari should be granted and that the writ issue to review the judgments, orders and opinion of the Sixth Circuit entered in Case No. 18,820. Petitioner intends to urge each of the points and questions presented, though not argued herein.

Respectfully submitted,

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APPENDIX

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29 USCA 158(e) [Sec. 8(e), Labor Management Relations Act, 1947, as amended]:

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void.

* * * * *